

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**GEORGE McCULLOUGH AND  
JAMES CRANSTON**

**APPELLANTS,**

**v.  
COMMERCE BANK**

**RESPONDENT.**

---

DOCKET NUMBER WD71625  
DATE: July 26, 2011

---

Appeal From:

Jackson County Circuit Court  
The Honorable Sandra C. Midkiff, Judge

---

Appellate Judges:

Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

---

Attorneys:

Patrick G. Reavey, Kansas City, MO, for appellants.

Kimberly A. Jones and Christi J. Hilker-Vaglio, Kansas City, MO, for respondent.

---

**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**GEORGE McCULLOUGH AND  
JAMES CRANSTON,**

**APPELLANTS,**

**v.  
COMMERCE BANK,**

**RESPONDENT.**

No. WD71625

Jackson County

Before Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

George McCullough and James Cranston appeal from the trial court's judgment denying their motion for new trial after a jury trial resulted in a verdict in favor of Commerce Bank on claims of employment discrimination. Appellants contend that the trial court erred in: (1) denying their motion for new trial because it erroneously applied the standard for determining whether newly discovered evidence warrants a new trial under Rule 78.01 instead of a standard Appellants claim, for the first time on appeal, should apply to determine whether the withholding of evidence warrants vacation of a judgment under Rule 74.06(b)(2); and (2) refusing to give four non-MAI jury instructions addressing pretextual termination.

**Affirmed.**

(1) Though Appellants' motion for new trial mentioned both Rule 74.06 and Rule 78.01 in the introductory paragraph, Appellants' subsequent discussion of the discovery issues did not assert that a different standard should be applied depending on the application of either Rule 74.06 or Rule 78.01. In fact, the motion made no further reference to either Rule. On appeal, Appellants argue that the mere negligent or unintended failure to produce evidence within the scope of propounded discovery constitutes "misconduct" under Rule 74.06(b)(2) warranting the vacation of the judgment, whether or not the withheld discovery might have impacted the outcome at trial; an argument never presented to the trial court. As such, Appellants' argument that a different standard applied was not preserved for review as it was raised for the first time on appeal.

(2) Even if Appellants' argument had been properly preserved, it would still fail as it is unsupported by any authority. Missouri courts have routinely required proof of fraud or purposeful misconduct by clear and convincing evidence to support vacating a judgment in reliance on Rule 74.06(b)(2). At the evidentiary hearing, Appellants admitted that they were not suggesting that Commerce Bank's counsel actively misled the Appellants and Appellants neither alleged nor argued that Commerce Bank's counsel engaged in fraud or purposeful misconduct.

(3) In 2005, Missouri courts adopted MAI 31.24, which abandoned the burden shifting analysis customarily employed in federal discrimination cases. Thus, in deciding an MHRA case, we are guided by Missouri law, and by federal employment discrimination case law only to the extent it is consistent with Missouri law. The trial court did not abuse its discretion in refusing to give non-MAI pretext instructions based on federal authority that were unsupported by Missouri law especially where it was undisputed that MAI 31.24 accurately stated the law.

Opinion by Cynthia L. Martin, Judge

July 26, 2011

\*\*\*\*\*

This summary is UNOFFICIAL and should not be quoted or cited.
---